91-166

NO.

Sup... Court, U.S.
FILED
JUL 16 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

KIAT VARNISHUNG, M.D.

Petitioner

VERSUS

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William F. Wessel
Counsel of Record
Charlotte A. Lagarde

WESSEL, BARTELS & CIACCIO
LAW CORPORATION
127 Camp Street
New Orleans, LA 70130
(504) 568-1112

Counsel for Petitioner,
Kiat Varnishung, M.D.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

1. Whether the void-for vagueness inquiry requires the application of both the "fair notice" and "arbitrary or discriminatory enforcement" tests as enunciated by this Court in *Kolender v. Lawson.*

2. Whether the requirement that a statute give fair notice of the conduct which it proscribes can be satisfied by an enforcement officer's advice as to what the statute means.

3. Whether the phrase "each principal place of business" as found in 21 U.S.C. § 822(e) is unconstitutionally vague.

4. Whether a loophole in the law exists in that no penalty statute addresses a physician's failure to have multiple registration certificates when such physician dispenses within the bounds of legitimate medical practice and dispenses only those controlled substances named on the certificates he does hold.

5. Whether, in the interest of justice, an appellate court should be required to decide an issue raised for the first time on appeal when the issue is purely one of law requiring no further development of the factual record and when the proper resolution is beyond doubt.

6. Whether a district court may usurp the factfinding function of a jury by determining on summary judgment the contested factual issue of whether a particular location was a principal place of business for the petitioner.

7. Whether the $134,000 fine should be reduced as being unreasonably excessive for a mere technical violation.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 5

Reasons for Granting the Writ 6

I. This case presents significant issues of first impression decided improperly by the courts below 6

A. The lower courts defined an ambiguous phrase in a manner that does not comport with congressional intent 7

B. The lower court failed to identify the loophole in the law which provides absolutely no penalty for the violation at issue here 9

II. The decision below is in conflict with the decisions of other Courts of Appeals and defies the term "manifest injustice." 10

III. The void-for-vagueness standard employed by the appellate panel abrogates the law as established by the United States Supreme Court 13

TABLE OF CONTENTS (continued)

Page

IV. The District Court departed from accepted practice by deciding a contested issue of fact on summary judgment and after a jury trial had been requested 15

V. The Court below committed most grievous error in its assessment of damages against the petitioner 16

Conclusion 17

Certificate of Service 18

APPENDIX:

Appendix A
Opinion of U.S. Court of Appeals for the Fifth Circuit on Suggestions for Rehearing A-1

Appendix B
Original Opinion of U.S. Court of Appeals for the Fifth Circuit A-6

Appendix C
Order and Reasons of U.S. District Court A-13

Appendix D
Judgment of U.S. District Court A-28

Appendix E
Order of U.S. District Court to dismiss case statistically A-31

TABLE OF AUTHORITIES

CASES **Page**

Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) 15

Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed 322 (1926) 9,13

Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355 (11th Cir. 1984) 12

Empire Life Ins. Co. of America v. Valdak Corp., 468 F.2d 330 (5th Cir. 1972) 11

Gentile v. State Bar of Nevada, 59 U.S.L.W. 4858 (June 27, 1991) 13

Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) 13

Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) i,7,13,14,15

Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) 13

Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) 11

Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) 13,14

Telco Leasing v. Transwestern Title Co., 630 F.2d 691 (9th Cir. 1980) 11

United States v. Moore, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975) 10,16

U.S.. v. Clinical Leasing Services, Inc., 925 F.2d 120 (5th Cir. 1991) 14

TABLE OF AUTHORITIES (continued)

CASES

Page

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) 13

STATUTES:

21 U.S.C. § 842(a)(2) 2,9,10,11,16

21 U.S.C. § 842(a)(1) 2,9-10,16

21 U.S.C. § 829 2,10

21 U.S.C. § 841 10

21 U.S.C. § 822(e) i,4,6,7,8,9,14

21 U.S.C. § 1301.23 4,8

NOTE: Other parties to this suit include Clinical Leasing Service, Inc., d/b/a Delta Women's Clinic, Inc., d/b/a Delta Women's Clinic, Delta Women's Clinic, Inc., Roy Claude Wood, Jr., M.D. and Richardson B. Glidden, M.D.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

CLINICAL LEASING SERVICE, INC.
d/b/a DELTA WOMEN'S CLINIC, INC.
d/b/a DELTA WOMEN'S CLINIC,
DELTA WOMEN'S CLINIC, INC.
KIAT VARNISHUNG, M.D.
ROY CLAUDE WOOD, JR., M.D. and
RICHARDSON B. GLIDDEN, M.D.
Petitioners

VERSUS

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, Kiat Varnishung, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 1 and April 17, 1991.

OPINIONS BELOW

The two opinions of the Fifth Circuit appear in the Appendix hereto. The judgment of the District Court for the Eastern District of Louisiana is also attached in the Appendix together with the Findings of Fact and Conclusions of Law issued therein.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 1, 1991. A timely petition for rehearing was denied on April 17, 1991, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

JURISDICTION OF THE TRIAL COURT

The United States District Court for the Eastern District of Louisiana had federal question jurisdiction pursuant to 28 U.S.C. § 1332.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 21, § 842(a)(1):

> It shall be unlawful for any person who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title.

United States Code, Title 21, § 842(a)(2):

> It shall be unlawful for any person who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration.

United States Code, Title 21, § 829:

Schedule II Substances

(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an

ultimate user, no controlled substance in schedule II, which is a prescription drug as determined in the Federal Food, Drug and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

Schedule III and IV substances

(b) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless reviewed by the practitioner.

Schedule V substances

(c) No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

Non-prescription drugs with abuse potential

(d) Whenever it appears to the Attorney General that a drug not considered to be a

prescription drug under the Federal Food, Drug, and Cosmetic Act should be so considered because of its abuse potential, he shall so advise the Secretary and furnish to him available data relevant thereto.

United States Code, Title 21, § 822(e):

A separate registration shall be required at each principal place of business or professional practice where the applicant manufactures, distributes or dispenses controlled substances.

Code of Federal Regulations, Title 21, § 1301.23 (1990).

(a) A separate registration is required for each principal place of business or professional practice at one general physicial location where controlled substances are manufactured, distributed, or dispensed by a person.

(b) The following locations shall be deemed not to be places where controlled substances are manufactured, distributed, or dispensed:

(1) A warehouse where controlled substances are stored by or on behalf of a registered person, unless such substances are distributed directly from such warehouse to registered locations other than the registered location from which the substances were delivered or to persons not required to register by virtue of subsection 302(c)(2) of the Act (21 U.S.C. 822(c)(2));

(2) An office used by agents of a registrant where sales of controlled substances are solicited, made, or supervised but which neither contains such substances (other than substances for display pur-

poses or lawful distribution as samples only) nor serves as a distribution point for filling sales orders; and

(3) An office used by a practitioner (who is registered at another location) where controlled substances are prescribed but neither administered nor otherwise dispensed as a regular part of the professional practice of the practitioner at such office, and where no supplies of controlled substances are maintained.

STATEMENT OF THE CASE

On August 24, 1988, a Drug Enforcement Administration (DEA) investigator visited the Delta Women's Clinic in New Orleans, Louisiana to determine whether the Clinic was in compliance with federal regulations. The investigator determined that the Clinic's doctors were dispensing controlled substances without any physician being registered to dispense at that location. Each doctor, however, held a federal registration to dispense drugs at his main office, and a state registration to dispense at any location within Louisiana. The investigator told the Clinic Administrator that a doctor would have to apply for a federal registration at the Clinic. Immediately thereafter, Dr. Kiat Varnishung, the petitioner herein, completed and mailed his application for registration.

Although DEA application approval normally takes only six to eight weeks, Dr. Varnishung's application was purposely slowed by the DEA investigator. Varnishung's certificate still had not arrived by February 1989 when he ceased working at the clinic. During the many months that his application was pending, Dr. Varnishung had continued to care for his patients at the clinic, with such care calling for the dispensing or administering of controlled

substances sixty-seven times.

Upon learning that fact, the United States charged Dr. Varnishung with violating 21 U.S.C. § 822(e) by failing to register to dispense drugs at the clinic before so dispensing. The district court granted summary judgment in favor of the U.S. on the basis that the clinic was a "principal place of business" for Dr. Varnishung under section 822(e). During the time period relevant to this lawsuit, Dr. Varnishung spent most of his working hours at his main office at 3400 St. Claude Avenue, New Orleans, Louisiana, and at 3040 Ridgelake Drive, Metairie, Louisiana. He was duly registered to dispense controlled substances at both of those locations. Dr. Varnishung spent only eight hours per week working at a third location, the Delta Women's Clinic, where his job consisted mainly of performing abortions. Importantly, Dr. Varnishung dispensed or administered controlled substances only to patients who legitimately needed them. No diversion of drugs from legitimate to illegitimate channels occurred.

Pursuant to a trial to fix penalties, the district court fined Dr. Varnishung $2,000 per violation, for a total of $134,000. Dr. Varnishung appealed that decision on several theories including, as raised in his reply brief, the failure of the penalty statute to address his conduct. The appellate court agreed that the penalty statute did not address Dr. Varnishung's conduct, but affirmed the lower court decision because the inapplicability of the penalty statute was raised for the first time on appeal.

REASONS FOR GRANTING THE WRIT

I. *This case presents significant issues of first impression improperly decided by the courts below.*

This case presents two questions of first impression

which are of particular national significance. Both involve statutes which have never before been used to prosecute physicians who dispense drugs within legitimate channels for valid medical reasons. Both questions affect thousands of physicians who practice at more than one location, and both address the serious national concern of monitoring drug transactions. Proper resolution of these crucial issues is necessary to prevent further prosecution of physicians who cannot, due to statutory ambiguity, determine the bounds of the law.

A. *The lower courts defined an ambiguous phrase in a manner that does not comport with congressional intent.*

Until this case, no court has ever been called upon to interpret the undefined language "each principal place of business" as found in 21 U.S.C. § 822(e). Section 822(e) provides in full:

> "A separate registration shall be required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances."

The petitioner has contended from the beginning that section 822(e) is unconstitutionally vague in that it fails to provide the requisite fair notice of the proscribed conduct. See, *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The statute is particularly vague in its application to the petitioner, who administered and dispensed drugs to patients at three different locations.

Inherent ambiguity lies in the juxtaposition of the words "each" and "principal" in the phrase "each principal place of business." These words are necessarily contradic-

tory in that "each" implies more than one, but "principal," meaning "most important" or "chief," implies only one. See, *Webster's New Collegiate Dictionary*. Required registration at each most important place of business simply makes no sense, for only one place can be the most important.

Taking liberty with the definition of "principal" by removing from it the superlative form "most," the appellate panel equated "each principal place of business" with "each important or consequential place of business." But to instruct a physician to register at each important or consequential place of business is not to instruct him at all. Every place of business is important or consequential to the physician and the patients whom he sees there, but is not necessarily important or consequential to others. The terms principal, important, and consequential are classic terms of degree which, as used here, fail to specify the bounds of lawful conduct.

The appellate court attempted to clarify this confusion by further equating "principal place of business" with the dispensing function of a physician. The Court cited 21 C.F.R. § 1301.23(b) for that proposition without realizing that that regulation addresses only the second criteria of § 822(e), that is, places "where controlled substances are manufactured, distributed, or dispensed." The regulation does not broach the topic of "principal place of business" and thus cannot properly be used to define it. Further, in defining a principal place of business as a place where one "regularly dispensed," the lower court effectively re-wrote section 822(e) as follows:

> A. A separate registration is required at each (omit "principal") place of business or professional practice where the applicant (add "regular-

> ly") manufactures, distributes or dispenses controlled substances.

Had Congress intended it to give the statute that meaning, it certainly would have drafted it that way.

To be sure, Congress included the word "principal" in the operable phrase to compel the conclusion that not all places of business need be registered. The statute clearly implicates that a physician's main office must be registered, but the clarity ends there. Physicians who have more than one office are left to guess as to what conduct is proscribed, and such necessary guesswork clearly renders this statute unconstitutional. See, *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926).

As the jurisprudence now stands, the thousands of physicians who are bound by the indefinite language of § 822(e) are subject to serious penalties for each and every dispensation made while a location remains unregistered. This important matter of statutory construction should be resolved by this Court to avoid any further miscalculation by physicians as to the number of places needing registration.

B. *The lower court failed to identify the loophole in the law which provides absolutely no penalty for the violation at issue here.*

The next issue of first impression and of national significance concerns the loophole in the law which provides no penalty for registrants who fail to register at same locations. The appellate court determined that although Dr. Varnishung's conduct was not punishable under 21 U.S.C. § 842(a)(2), it was punishable under 21 U.S.C.

§ 842(a)(1). Such is not the case. Dr. Varnishung was charged with dispensing controlled substances from a location where he had no registration certificate. Section 842(a)(1), however, refers to 21 U.S.C. § 829 and concerns the dispensation of controlled substances without written prescriptions. Practitioners like Dr. Varnishung who dispense to ultimate users are explicity excepted from provisions of section 829. See, 21 U.S.C. § 829. Moreover, Dr. Varnishung was never charged with a violation of that section. With neither evidence nor allegations of section 829 violations, Dr. Varnishung cannot be penalized under § 842(a)(1).

Nor can a physician like Varnishung who is registered at some, but not all, locations be penalized under § 842(a)(2). That section prohibits registrants from dispensing any controlled substances other than the ones named on their certificates. It does not prohibit dispensing altogether, and it is not location-specific. Thus, it does not apply to mere location violations such as the one charged here. Of similar inapplicability, 21 U.S.C. § 841 addresses serious criminal conduct of physicians and common drug pushers who distribute or dispense drugs outside of legitimate channels. See, *United States v. Moore,* 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975). Dr. Varnishung did not dispense outside of legitimate bounds, and no evidence or allegation attests otherwise. Because none of the penalty statutes addresses the conduct charged in this case, a loophole compelling this Court's attention exists in the law.

II. *The decision below is in conflict with the decisions of other Courts of Appeal and defies the term "manifest injustice."*

On Suggestions of Rehearing En Banc, the United

States Court of Appeals for the Fifth Circuit determined that 21 U.S.C. § 842(a)(2), the penalty statute under which Dr. Varnishung was prosecuted and punished, did not apply to his conduct. The Court, however, refused to reverse the decision below on the ground that Dr. Varnishung presented the issue for the first time on appeal. Using the manifest injustice standard, the Court held that another *uncharged* statute did apply to Dr. Varnishung's conduct, and that punishment under the wrong statutory penalty provision did not constitute manifest injustice.

The "manifest injustice" standard is but one of a myriad of standards used within and among the various circuits. The question of when an appellate court should decide an issue first raised on appeal was left largely unanswered by the United States Supreme Court fifteen years ago in *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), where the Court stated, "We announce no general rule." Since *Singleton*, the unfettered discretion of the appellate courts has resulted in the application of numerous standards ranging from the broad and positive to the narrow and negative.

Reflecting the broad and positive is the rule established by the Fifth Circuit in *Empire Life Insurance Company of America v. Valdak Corp.*, 468 F.2d 330 (5th Cir. 1972). There, both parties were in error as to the applicable law, and the Court raised the issue regarding the applicable law *sua sponte*. *Empire's* standard of deciding new issues "when the ends of justice will best be served by doing so" and its invitation to address issues *sua sponte* are still viable today. More restrictive is the Ninth Circuit test that where an issue is purely one of law and requires no further development of the factual record below, the appellate court has discretion to consider for the first time that issue on appeal. *Telco Leasing v. Transwestern Title*

Co., 630 F.2d 693-94 (9th Cir. 1980). Perhaps the most helpful standard is that of the Eleventh Circuit, which has enumerated a list of "certain exceptional circumstances" under which it will determine a new issue, including: 1) when an issue is a pure question of law; 2) where the appellant had no opportunity to object; 3) where an interest of substantial justice is at stake; 4) where the proper resolution is beyond any doubt; and 5) where an issue is of general impact or of great public concern. *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984).

Importantly, none of these standards is the only standard in any circuit. The circuits borrow from each other and permutate their rules at will, with the uneven result of treating similarly situated appellants differently. Under any of the above standards, Dr. Varnishung would have prevailed on appeal, for the issue regarding the penalty statute was purely one of law requiring no further development of the factual record, and the proper resolution of the case was, as shown by the Fifth Circuit, beyond doubt. Consistency in the law being of utmost importance, and consistency being found neither within nor among the circuits on this issue, this Court should exercise its power to give needed guidance to the appellate courts.

A second concern regarding the ruling is whether the appellate court's decision constitutes a departure so far from the accepted course of proceedings that it cries out for this Court's review. In affirming the trial court decision on the basis that Dr. Varnishung's conduct was punishable under an *uncharged* statute, the court effectively usurped the prosecutor's duty of charging the defendant with the proper penalty statute and precluded the defendant from defending against that charge. This action resulted in the petitioner's punishment, notwithstanding the fact that *no* applicable penalty statute existed. (See part I (B) of this

Petition.) Nothing can be more "manifestly unjust" than to be deemed guilty without due process and be penalized when the law provided no penalty.

III. *The void-for-vagueness standard employed by the appellate panel abrogates the law as established by the United States Supreme Court.*

The U.S. Court of Appeals for the Fifth Circuit, in its two opinions below addressing the proper standard for the void-for-vagueness inquiry, effectively abandoned the test set forth by the majority opinion in *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), and adopted the dissent as per Justice White. That diversion to the dissenting opinion files in the face of well established precedent and alters the law so dangerously as to require immediate correction by this Court.

Kolender, its predecessors and progeny explicitly direct that a two-pronged test be used in void-for-vagueness inquiries involving statutes which are penal in nature and which reach constitutionally protected activity. *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1858-59; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926); *Gentile v. State Bar of Nevada*, 59 U.S.L.W. 4858 (June 27, 1991). Such statutes pass constitutional muster only if they:

1. Define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and

2. Define the criminal offense in a manner that does not encourage arbitrary and discriminatory enforcement.

Kolender, 461 U.S. at 357, 103 S.Ct. at 1858. This Court has further recognized "that the more important aspect of the vagueness doctrine 'is not the actual notice, but... the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Id.* at 358, 103 S.Ct. at 1858 (quoting *Smith v. Goguen*, 415 U.S. at 575, 94 S.Ct. at 1248).

The Fifth Circuit panel correctly acknowledged that the penalty statute implicated in this case authorizes fines which, although civil in description, are penal in nature. *U.S. v. Clinical Leasing Services, Inc.*, 925 F.2d 120, 122 n.2 (5th Cir. 1991). Whether 21 U.S.C. § 822(e), which requires physicians to register prior to administering or dispensing drugs, reaches a substantial amount of constitutionally protected conduct was not addressed by the appellate panel, but is answered affirmatively as follows. The petitioner, Dr. Varnishung, is an obstetrician/gynecologist who enjoys the constitutionally protected right to perform abortions. Without registration, Dr. Varnishung cannot lawfully administer or dispense controlled substances. Without administering or dispensing controlled substances, Dr. Varnishung cannot perform abortions. Thus, the registration statute directly reaches constitutionally protected activity. Such activity was in fact the medical reason for the dispensations charged in this case against Dr. Varnishung.

Instead of analyzing section 822(e) for vagueness under the two-pronged *Kolender* test, the Fifth Circuit panel merely paid lip service to that test and focused its attention on the "test" of whether the enactment is "impermissibly vague in all of its applications." *Clinical Leasing*

Services, Inc., 925 F.2d at 123. That "test," espoused in the *Kolender* dissent and strongly repudiated by the *Kolender* majority (461 U.S. at 358 n. 8, 103 S.Ct. at 1859 n.8) is not valid in this context and has absolutely no place in this analysis. This Court has invalidated criminal statutes even when, as written, they could conceivably have had some valid application. See *Colautti v. Franklin*, 439 U.S. 379, 493-401, 99 S.Ct. 675, 685-88, 58 L.Ed.2d 596 (1979).

The Fifth Circuit's opinion is dangerously flawed in three major respects. First, it asserts that fair notice is achieved when an enforcement officer espouses her opinion as to what the law means. This assertion ignores the requirement that the statute itself give notice of the proscribed behavior. *Kolender*, 461 U.S. at 358, 103 S.Ct. at 1858. Second, the opinion completely disregards the more important prong of the *Kolender* test, that is, the risk of discriminatory enforcement. Such risk is particularly high here where the decades-old statute has never, in any reported case, been used to prosecute a physician dispensing drugs within legitimate channels, but is now being used to prosecute one such physician. That risk is further elevated by the fact that Dr. Varnishung performs abortions, a procedure hotly debated and viewed with disfavor by many. Third, the opinion fails to recognize that the law is vague in its specific application to Dr. Varnishung, who had registered two of three locations. (See part I (A) of this Petition.) These errors so contradict established principles of law that they merit the attention of this Court.

IV. *The District Court departed from accepted practice by deciding a contested issue of fact on summary judgment after a jury trial had been requested.*

Throughout this case, the petitioner has steadfastly

argued that the question of whether the Clinic was a principal place of business for him was a question of fact. This case was scheduled for full trial by jury until the district court granted a partial summary judgment in favor of the United States. In its decision, the District Court held that the Delta Women's Clinic was a principal place of business for Dr. Varnishung. Although the proper definition of "principal place of business" is a matter of statutory construction and is therefore a question of law, the determination of whether, in view of the facts, a particular location fits that definition is a classic question of fact. The District Court is not the proper factfinder when a trial by jury has been requested, and the trial court erred in taking the fact-finding function away from the jury on summary judgment. Such error is so far from the usual and accepted course of proceedings that it requires review by this Court.

V. *The Court below committed most grievous error in its assessment of damages against the petitioner.*

In assessing the $134,000 penalty against the petitioner, the U.S. District Court averred that "the regulations that the defendants failed to follow are not just technical, but they are very significant." This statement fails to recognize the previous assertions of both Congress and this Court that violations of § 842 are merely "technical violations." *U.S. v. Moore*, 423 U.S. 122, 135 (1975); H.R. Rep. No. 91-4444, p. 10. The steep fine imposed far surpasses the degree of petitioner's culpability and does not reflect the mere technicality of the violations. The interests of justice will best be served by this Court's reduction of the fine to a more suitable level should this Court not reverse the appellate court's decision on other grounds.

CONCLUSION

For all of the foregoing reasons a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted,

WESSEL, BARTELS & CIACCIO
LAW CORPORATION

BY: _____

William F. Wessel (#8551)
Counsel of Record
Charlotte A. Lagarde (#20257)
127 Camp Street
New Orleans, LA 70130
(504) 568-1112

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made on counsel for all parties this date, in accordance with law, by depositing three copies thereof in the United States Mail, postage prepaid, to the following:

Thomas L. Watson
Assistant U.S. Attorney
Hale Boggs Federal building
501 Magazine Street
New Orleans, LA 70130

Charles E. Cotton
1001 Howard Avenue
Suite 4300
New Orleans, LA 70113

Lawrence Blake Jones
David C. Whitmore
837 Gravier Street
New Orleans, LA 70112

Solicitor General
Department of Justice
Washington, D. C. 20543

DATED JULY 16, 1991

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

CLINICAL LEASING SERVICE, INC. d/b/a Delta Women's Clinic, Inc. and Delta Women's Clinic, Delta Women's Clinic, Inc., Kiat Varnishung, M.D., Roy Claude Wood, Jr., M.D., Richardson B. Glidden, M.D., Defendant-Appellants.

No. 90-3251
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

April 17, 1991.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, SMITH and WIENER, Circuit Judges.

JOHNSON, Circuit Judge:

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion March 1, 1991, 5th Cir., 925 F.2d 120)

Clinical Leasing Service, Inc., and three affiliated doctors, Kiat Varnishung, Roy Claude Wood, Jr., and Richardson B. Glidden, appeal the district court's imposition of civil penalties for the dispensation of controlled substances without proper registration. On March 1, 1991,

this Court ruled that the judgment of the district court was based upon findings of fact which were not clearly erroneous and, therefore, affirmed under Local Rule 47.6 the district court's decision. *United States v. Clinical Leasing Service, Inc.* 925 F.2d 120 (5th Cir. 1991). The defendants have subsequently filed petitions for rehearing en banc. While we are persuaded that the defendants' petition does not change the original disposition of their appeal, we find it necessary to clarify our original opinion.

Any party who distributes or authorizes the distribution of controlled substances without adequate registration is subject to civil penalties. 21 U.S.C. § 842(a)(1) (1988).[1] Federal law requires a separate registration at each "principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances." *Id.* § 822(e) (1988). A regulation of the DEA specifically describes those locations in which separate registration is required. 21 C.F.R. § 1301.23 (1990). Section 1301.23 provides, in pertinent part:

---

[1] Dr. Varnishung contends that 21 U.S.C. § 842(a)(2), the penalty provision under which he was punished, does not apply to his conduct. He maintains that this section "speaks only to registrants, who, by virtue of their registration, are already authorized to distribute or dispense drugs" and does not prohibit the distribution of controlled substances by an unregistered physician. We agree. Section 842(a)(1), and not section 842(a)(2), is the appropriate penalty provision for the unlicensed dispensation or distribution of controlled substances. *United States v. Moore*, 423 U.S. 122, 134 n. 11, 96 S.Ct. 335, 341 n. 11, 46 L.Ed.2d 333 (1975); *United States v. Fooladi*, 746 F.2d 1027, 1032 (5th Cir.1984). Nonetheless, we do not find that this error requires reversal. Dr. Varnishung presented this issue for the first time in his reply brief. "In the absence of manifest injustice, this court will not consider arguments belatedly raised after appellees have filed their brief." *Najarro v. First Federal Savings and Loan*, 918 F.2d 513, 516 (5th Cir. 1990). Dr. Varnishung's conduct, although it did not support punishment under section 842(a)(2), supports punishment under section 842(a)(1). The punishment of illegal conduct under the wrong statutory penalty provision is not manifest injustice.

> (a) A separate registration is required for *each* principal place of business or professional practice at one general physical location where controlled substances are manufactured, distributed, or dispensed by a person.
>
> (b) The following locations shall be deemed not to be places where controlled substances are manufactured, distributed, or dispensed:
>
> . . . . .
>
> (3) An office used by a practioner (who is registered at another location) where controlled substances are prescribed but neither administered nor otherwise dispensed as a regular part of the professional practice of the practitioner at such office, and where no supplies of controlled substances are maintained.

Id. (emphasis added). This Court in its original opinion concluded that these federal registration provisions are not unconstitutionally vague. *Clinical Leasing Service, Inc.*, 925 F.2d at 123.

[1,2] In their petitions for rehearing, the defendants argue that this Court did not properly analyze the federal registration provisions. Isolating a particular paragraph in the original opinion, the defendants emphasize this Court's conclusion that the federal registration provisions apply to "*each* important or consequential place of business where the physician distributes controlled substances." *Id.* (citing Webster's New Collegiate Dictionary 908 (1979)) (emphasis in original). The defendants contend that, even under the Court's interpretation, the federal registration provisions are unconstitutionally vague because they do not provide standards that determine whether a place of business is "important" or "consequential."

The defendants' argument lacks merit. Every statute, whether civil or criminal, raises questions of interpretation. The fact that a statute fails to define its precise boundaries in every conceivable situation does not invalidate the statute. This Court will sustain a vagueness challenge *only* if the federal registration provisions are impermissibly vague in *all* of their applications. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). As we noted in our original opinion, the registration provisions require that a physician register separately "at each physical location in which he administers controlled substances as a regular part of his professional practice." *Clinical Leasing Service, Inc.*, 925 F.2d at 122. If a physician intends to dispense controlled substances from a particular location several times a week or month, he must first file a separate registration for the location. This aspect of the registration provisions is beyond cavil. Since the registration provisions are not impermissibly vague in this particular application, they are not unconstitutional.

Perhaps in some cases it may be unclear whether a physician is subject to the registration provisions.[2] This is not such a case. The defendants in this case, without question, have administered controlled substances at the Delta Women's Clinic as a regular part of their professional practice. Dr. Varnishung admitted that, during the period of the allegations contained in the complaint, he worked

---

[2] Admittedly, in many cases, the facts will not clearly demonstrate whether a physician performed proscribed actions as a "regular part of his professional practice." 21 C.F.R. § 1301.23. This, however, is a classic question of fact for a factfinder and does not alter the vagueness analysis. The term "regular part of his professional practice" is sufficiently definite that an ordinary physician would understand what conduct was covered. *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983).

approximately eight hours a week at the clinic. Dr. Glidden conceded in his deposition that, in three of the last four years, he earned between $8000 and $11,000 a year from procedures he performed in the Delta Women's Clinic. Dr. Wood, like the other defendants, frequently dispensed controlled substances at the clinic. The district court concluded, and we agree, that the defendants "regularly engage[d] in the dispensing or administering of controlled substances" at the clinic.

Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

CLINICAL LEASING SERVICE, INC. d/b/a Delta Women's Clinic, Inc. and Delta Women's Clinic, Delta Women's Clinic, Inc., Kiat Varnishung, M.D., Roy Claude Wood, Jr., M.D., Richardson B. Glidden, M.D., Defendant-Appellants.

No. 90-3251
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

March 1, 1991.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before JOHNSON, SMITH and WIENER, Circuit Judges.

JOHNSON, Circuit Judge:

Clinical Leasing Service, Inc., and three affiliated doctors, Kiat Varnishung, Roy Claude Wood, Jr., and Richardson B. Glidden, challenge the district court's imposition of civil penalties for the dispensation of controlled substances without proper registration. Among other arguments, the defendants allege that the federal statutory registration requirements are unconstitutionally vague.

Unable to conclude that the defendants' arguments have merit, this Court affirms the judgment of the district court.

I. FACTS AND PROCEDURAL HISTORY

In the late summer of 1988, the Drug Enforcement Administration ("DEA") received information that physicians associated with the Delta Women's Clinic in New Orleans, Louisiana, were distributing controlled substances. Because no physician or other individual was registered to dispense controlled substances from this facility, the DEA sent an investigator to the clinic. The investigator toured the clinic and observed that several controlled substances, including the potentially toxic drugs contrax and hydrocodone, were stored on the premises. She noted that some of these controlled substances were packaged in stapled, unmarked envelopes. The investigator provided clinic officials with copies of the federal regulations regarding the proper dispensation of controlled substances and warned them that the clinic could not administer or distribute such substances until a physician received a separate registration on the premises.

In the eight months after the initial inspection of the Delta Women's Clinic, the DEA processed two applications for registration on the clinic premises. Both of these applications, filed by Dr. Kiat Varnishung and Dr. Roy Claude Wood, Jr., were approved in the spring of 1989. Shortly thereafter, however, another DEA investigator procured an Administrative Inspection Warrant[1] on the premises of the Delta Women's Clinic. This investigator discovered a number of patient files which revealed that physicians had distributed controlled substances at the clinic between the date of the initial inspection and the date

---

[1] *See* 21 U.S.C. § 880 (1988).

that the DEA approved the registration of Dr. Vanishung and Dr. Wood.

On July 11, 1990, after a series of investigations of the pharmaceutical procedures at the Delta Women's Clinic, the Government filed this action against the operator of the clinic and the three physicians who had illegally distributed the controlled substances. The district court granted the Government a partial summary judgment on liability issues. After a short trial, the district court imposed a fine of $337,000 against Clinical Leasing Service and fines of $134,000, $118,000 and $26,000 against Dr. Varnishung, Dr. Wood and Dr. Glidden, respectively.

This Court finds that the "judgment of the District Court is based on findings of fact which are not clearly erroneous" and, therefore, affirms its decision. Loc.R. 47.6. We write, however, to explain our rejection of the defendants' complaint that the federal statutory registration requirements are unconstitutionally vague.

II. DISCUSSION

Federal law requires a separate registration at each "principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances." 21 U.S.C. § 822(e) (1988). Any party who distributes or authorizes the distribution of controlled substances without adequate registration is subject to civil penalties. *Id.* § 842(a)(2). A regulation of the DEA specifically describes those locations in which separate registration are required. 21 C.F.R. § 1301.23 (1990). Section 1301.23 provides, in pertinent part:

(a) A separate registration is required for *each*

> principal place of business or professional practice at one general physical location where controlled substances are manufactured, distributed, or dispensed by a person.
>
> (b) The following locations shall be deemed not to be places where controlled substances are manufactured, distributed, or dispensed:
>
> (3) An office used by a practitioner (who is registered at another location) where controlled substances are prescribed but neither administered nor otherwise dispensed as a regular part of the professional practice of the practitioner at such office, and where no supplies of controlled substances are maintained.

Id. (emphasis added). It is evident from the plain language of section 1301.23 that a physician must be separately registered at each physical location in which he administers controlled substances as a regular part of his professional practice.

[1-3] The defendants argue, however that the term "each principal place of business" is unconstitutionally vague. They maintain that the term suggests to an unwary practitioner that he need only register at his *primary* place of business and not necessarily *every* place of business. The void for vagueness doctrine requires that a statute define a criminal or quasicriminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). The statute in question authorizes *civil* penalties, but its prohibitory effect is quasi-criminal and warrants a relatively strict test: the reviewing court will

sustain the challenge "if the enactment is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982).[2] *See Home Depot, Inc. v. Guste*, 773 F.2d 616, 627-28 (5th cir. 1985); *Ferguson v. Estelle*, 718 F.2d 730, 732 n. 3 (5th Cir.1983).

[4,5] We do not apply the vaguemess standard mechanically; a variety of factors may affect the determination whether a statute passes constitutional muster. The nature of the enactment, for instance, is a significant factor. Economic regulations in particular, including licensing or registration requirements, are afforded considerable deference in the vagueness analysis because the regulated party may "have the ability to clarify the meaning of the regulation[s] by its own inquiry, or by resort to an administrative process." *Village of Hoffman Estates*, 455 U.S. at 498, 102 S.Ct. at 1193. An additional persuasive factor is the degree of notice to the complainant that his conduct is proscribed. The courts are ill disposed to entertain the vagueness challenges of a party who had ample warning that his actions violated statutory requirements. *Id.* at 502, 102 S.Ct. at 1195.

---

[2] The Government does not dispute that the federal statute implicated in this case authorizes fines which, although civil in description, are penal in character. *See Village of Hoffman Estates*, 455 U.S. at 499 & n. 16, 102 S.Ct. at 1194 & n. 16. Accordingly, we do not employ the less exacting standard of review of civil statutes. A civil statute is unconstitutionally vague only if it commands compliance in terms "so vague and indefinite as really to be no rule or standard at all," *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 589 (1925), or if it is "substantially incomprehensible." *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1033 (5th Cir. 1981), *cert. denied*, 454 U.S. 932, 102 S.Ct. 430, 70 L.Ed.2d 239 (1982). *See Jones v. City of Lubbock*, 727 F.2d 364, 373 (5th Cir.1984).

[6] While the term "each principal place of business' may engender some limited amount of confusion, we conclude that the term is not unconstitutionally vague. A principal meaning of the word "principal" is "important [or] consequential." Webster's New Collegiate Dictionary 908 (1979). A physician of ordinary means and intelligence would understand that the federal registration provisions apply to *each* important or consequential place of business where the physician distributes controlled substances. It is sufficiently clear that the application of the provisions is not limited to a *single* important or consequential place of business where controlled substances are distributed.

Clinical Leasing Service and its affiliated physicians have little right to argue now that they were misled by the "ambiguous" language of the federal registration provisions. DEA investigators explicitly warned the defendants that distribution of controlled substances was prohibited unless a physician was registered on the Delta Women's Clinic premises. Despite these warnings, illegal distribution of controlled substances continued unabated. It is the height of hypocrisy that the defendants, after being warned that the statutory provisions precisely governed their actions, now complain that the provisions are void for vagueness. This Court concludes that 21 U.S.C. §§ 822(e) & 842(a)(2) and their attendant federal regulations are not unconstitutionally vague.[3]

III. CONCLUSION

This Court is unable to discern that the district court committed reversible error. The judgment of the district

---

[3] The defendants complain that assorted other provisions of the Controlled Substances Act relative to recordkeeping and the improper use of prescriptions also are unconstitutionally vague. *See* 21 U.S.C. §§ 842(a)(1) & (5), 829. For the same reasons expressed herein, we disagree.

court is affirmed.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CIVIL ACTION
VERSUS	NO. 89-3041
CLINICAL LEASING SERVICE, INC., ET AL	SECTION "H"

ORDER AND REASONS

Before the court is a motion for partial summary judgment filed on behalf of the plaintiff, United States of America, against "defendants Clinical Leasing Service, Inc., Delta Women's Clinic, Kiat Varnishung, Roy Claude Wood, Jr., and Richardson B. Glidden," and a motion for summary judgment filed on behalf of "defendants, Clinical Leasing Service, Inc., d/b/a Delta Women's Clinic (the clinic), Richardson B. Glidden, M.D., and Roy Claude Wood, Jr., M.D."[1] For the following reasons, the defendants' motion is DENIED, and the government's motion is GRANTED.

MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

On August 22, 1988, Drug Enforcement Administra-

[1] The pleadings cause confusion as to the proper designation of the corporate defendant(s). The supplemental complaint lists two corporations; the motion for partial summary judgment refers to the defendants in the manner we quote. There is no pleading filed on behalf of "Delta Women's Clinic, Inc." We refer to the owner(s) of the clinic as "clinic"; the confusion can be clarified before judgment is entered.

tion investigators received information that controlled substances were being dispensed from Delta Women's Clinic, located at 1406 St. Charles Avenue, New Orleans, Louisiana. On that date, no physician or other person was registered to dispense controlled substances from that location.

On August 24, 1988, DEA investigators visited the clinic and warned the office manager, Toni Scott, and the clinic coordinator, Betty Lou Ward, that in order to dispense controlled substances the clinic must have a practitioner registered with the DEA at that location. The investigators provided them with a registration application and copies of the pertinent provisions of the Code of Federal Regulations.

On December 2, 1988, DEA investigators returned to the clinic to interview Dr. Kiat Varnishung and Ms. Scott regarding Dr. Varnishung's pending application for registration to dispense controlled substances at the clinic address. At this meeting, the investigators reviewed the pertinent federal regulations with Dr. Varnishung and Ms. Scott. Ms. Scott was warned to include the addresses of the patients in the clinic's drug log.

On March 16, 1989, Dr. Roy Claude Wood, Jr. became registered to dispense controlled substances at the clinic address, 1406 St. Charles Avenue.

On May 10 and 12, 1989, DEA compliance investigators conducted a follow-up investigation at the clinic. This investigation revealed numerous instances in which controlled substances had been dispensed from the clinic between August 24, 1988 (the date of the first warning) and March 16, 1989 (the date of Dr. Wood's registration). This investigation also revealed that even after

registration, the clinic's drug log did not contain the addresses of each of the patients to whom controlled substances were dispensed. However, most of the addresses could be obtained by reviewing all the patient records.

During the course of the follow-up investigation, it was discovered that Dr. Wood had obtained thirty-eight tablets of Diazepam (Valium) by issuing a prescription to Toni Scott. Dr. Wood admitted that the Valium was not for Ms. Scott, nor was she under his professional care. Dr. Wood stated that he obtained the Valium in order to dispense it to patients at the clinic. Twenty-two of the thirty-eight Valium tablets remained in the bottle; they were seized by DEA.

The government instituted the present litigation against the clinic and the three doctors associated with the clinic, seeking civil penalties for violations of the Controlled Substances Act, 21 U.S.C. §801, *et seq.* Specifically, the clinic and the doctors are charged with having violated the Act by refusing or failing to make, keep or furnish records required by law. The doctors are also charged with failure to properly register to dispense controlled substances at the clinic. Finally, Dr. Wood is charged with illegally issuing the prescription for Valium to Toni Scott.

We now address the legal issues involved in each of the charges against each defendant.

THE CLINIC

COUNT 7(a)

In Count 7(a), the government alleges that on one hundred occasions between August 24, 1988 and March 16,

1989, while the clinic was not registered with the DEA to dispense controlled substances from 1406 St. Charles Avenue, controlled substances were in fact dispensed from that location without record keeping required by law.

The clinic is not charged with failing to obtain a registration; indeed, only physicians may do so. The clinic is charged with failure to maintain proper records. The law clearly requires every "person" (including a corporation) to maintain proper records if that person dispenses controlled substances. By employing physicians to dispense drugs in connection with its operation, the clinic is a dispenser of controlled substances. Therefore, the clinic, as well as the physicians it employs, must maintain the proper records required by law.

Congress has made it "unlawful for any person — to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required . . . ." 21 U.S.C. §842(a)(5).

The records must contain such relevant information as may be required by the regulations of the Attorney General and must be made available for inspection by designated government officers or employees:

> Every inventory or other record required under this section (1) shall be in accordance with, and contain such relevant information as may be required by, regulations of the Attorney General, (2) shall (A) be maintained separately from all other records of the registrant, or (B) alternatively, in the case of non-narcotic controlled substances, be in such form that information required by the Attorney General is readily retrievable from the ordinary business records of the registrant, and (3) shall be kept and available,

> for at least two years, for inspection and copying by officers or employees of the United States authorized by the Attorney General.

21 U.S.C. §827(b).

Additionally, 21 C.F.R. §1304.24 sets forth exactly what records and information must be kept and be made available for inspection by the DEA. It provides:

> Each person registsered or authorized (by §1301.22(b) of this chapter) to dispense or conduct research with controlled substances and required to keep records pursuant to §1304.03 shall maintain records with the following information for each controlled substance:
>
> (a) The name of the substance;
>
> (b) Each finished form (e.g., 10-milligram tablet or 10-milligram concentration per fluid ounce or milliliter) and the number of units or volume of finished form in each commercial container (e.g., 100-tablet bottle or 3-milliliter vial);
>
> (c) The number of commercial containers of each such finished form received from other persons, including the date of and number of containers in each receipt and the name, address, and registration number of the person from whom the containers were received;
>
> (d) The number of units or volume of each finished form dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or ad-

ministered the substance on behalf of the dispenser; and

(e) The number of units or volume of such finished forms and/or commercial containers disposed of in any other manner by the registrant, including the date and manner of disposal and the quantity of the substance in finished form disposed.

The clinic contends that it was not required to maintain records, arguing that the record keeping requirements pertain only to "registrants." Since it was not a "registrant," it was not required to keep records.

However, 21 U.S.C. §842(a)(5), the statute under which the clinic is charged, does not require that one who refuses or fails to make, keep, or furnish records be a "registrant." On the contrary, 21 U.S.C. §842(a)(5) provides that "[i]t shall be unlawful for *any person* to refuse or fail to make, keep, or furnish" records. [emphasis added]. 21 C.F.R. §1301.02(j) defines "person" as "any individual, corporation, government or governmental subdivision or agency, business trust, partnership, association, or other legal entity."

In order to monitor the flow of controlled substances within the United States, Congress made it unlawful for "*any person*" to either refuse or fail to make, keep or furnish records. Congressional intent is clear upon review of the other provisions of §842(a). 21 U.S.C. §§ 842(a)(2) and (3) provide:

It shall be unlawful for any person—

* * *

(2) who is a registrant to distribute or dispense

> a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;
>
> (3) who is a registrant to distribute a controlled substance in violation of section 825 of this title.

Had Congress intended to limit the applicability of §842(a)(5) to registrants only, it would have done so, as it did in §§ 842(a)(2) and (3). *See United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335 (1975).

COUNT 7(b)

In count 7(b), the government charges that from March 16, 1989 until May 10, 1989, a period during which a physician was registered to dispense controlled substances at the clinic, the clinic failed to include in its drug log the addresses of the individuals to whom controlled substances were administered. The government submits that although this occurred on hundreds of occasions, it chose to charge a single violation for each of the thirty-seven pages of the drug log which omit the addresses of the patients.

21 C.F.R. §1304(d) requires that:

> Each person registered or authorized (by §1301.22(b) of this chapter) to dispense or conduct research with controlled substances and required to keep records pursuant to §1304.03 shall maintain records with the following information for each controlled substance:
>
> * * *
>
> (d) The number of units or volume of such finished

> form dispensed, including the name and *address* of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the substance on behalf of the dispenser. [emphasis added].

The records (including the address of the person to whom a controlled substance was dispensed) must either be maintained separately from all other records of the registrant or be in such form that the required information is readily retrievable from the ordinary business records of the registrant. 21 U.S.C. §827(b).

According to the uncontroverted affidavit of DEA investigator Ira Wald, the clinic had a system whereby each patient was assigned a number upon entry into the clinic. The patient files were maintained sequentially by these numbers. The drug log did not contain the numbers but, rather, the names of the patients. Therefore, in order to retrieve the patients' addresses, all the files had to be reviewed. by maintaining this system, the clinic violated the requirements in 21 U.S.C. §827(b) that it keep the addresses of patients to whom controlled substances were administered separate, or readily retrievable.

DRS. WOOD, VARNISHUNG AND GLIDDEN

COUNTS 7(c), (d) and (e)

In Counts 7(c), (d) and (e), the government alleges that Drs. Wood, Varnishung and Glidden, respectively, dispensed specified controlled substances from the clinic without being registered to do so, and that they failed to maintain required records as to these activities.

Specifically, in Count 7(c), the government claims that on seven dates (54 different times) in February, 1989, Dr. Wood, who was registered to dispense controlled substances only at 223 Fernwood Drive, Baton Rouge, Louisiana, dispensed controlled substances at the clinic, contrary to his registration. In Count 7(d), the government claims that on thirty-nine dates (67 different times) between September 6, 1988 and January 27, 1989, Dr. Varnishung, who was registered to dispense controlled substances only at 3480 St. Claude Avenue, New Orleans, Louisiana and 3040 Ridgelake Drive, Metairie, Louisiana, dispensed controlled substances at the clinic, contrary to his registration. In Count 7(e), the government claims that on three dates (13 different times) in February, 1989, Dr. Glidden, who was registered to dispense controlled substances only at 4829 Bennington Avenue, Baton Rouge, Louisiana, dispensed controlled substances at the clinic, contrary to his registration.

The government contends that these activities of the doctors constitute a violation of 21 U.S.C. §842(a)(2):

> (a) It shall be unlawful for any person —
>
> (2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration.

It is undisputed that while the three doctors were registered to dispense controlled substances at other locations, they were not registered to do so at the clinic.

21 U.S.C. §822(e) states, "A separate registration shall be required at each principal place of business or professional practice where the applicant manufactures,

distributes, or dispenses controlled substances." Additionally, 21 C.F.R. § 1301.23(a) provides:

> (a) A separate registration is required for each principal place of business or professional practice at one general physical location where controlled substances are manufactured, distributed or dispensed by a person.

The doctors argue that they were not required to register to dispense controlled substances at the clinic, contending that the clinic was not a "principal place of business." The record proves otherwise.

Dr. Varnishung, in his affidavit, stated that during the period of the allegations contained in the complaint (approximately five months), he worked approximately eight hours per week at the clinic. The complaint charges and the government has proved that on thirty-nine days during that period, he dispensed or administered controlled substances sixty-seven different times. Dr. Wood, in the agreement between him and the clinic, dated February 8, 1989, the date of the first charge against him, agreed to perform "all of his medical services" at the clinic and to be "on call" as needed when in New Orleans, for a period of fifty weeks per year. The complaint charges and the government has proved that on seven dates in his first month at the clinic, Wood dispensed or administered controlled substances fifty-four different times. Dr. Glidden stated in his deposition that in three of the last four years, he earned between $8,000 and $11,000 from procedures performed at the clinic. The complaint charges and the government has proved that on three days in February, 1989, he dispensed or administered controlled substances thirteen different times. We conclude from these undisputed facts that each of these defendants "regularly engage[d] in the dispensing

or administering of controlled substances" at the clinic.

The legislative history of the Controlled Substances Act provides that "all persons engaged in the legitimate chain involving drugs . . . must be registered with the Attorney General." 1970 U.S. Code Cong. & Admin. News, 91st Cong. 2nd Sess., 4589. The statutes and the regulations give effect to this Congressional policy. It was clearly not the intent of Congress to permit a physician to designate one or two offices as his principal places of business and then regularly dispense controlled substances from other locations without any supervision by the DEA.

We give the phrase "each principal place of business," as it is used in 21 U.S.C. §822(e) and 21 C.F.R. §1301.23(a) a fair meaning in accordance with the intent of Congress; we conclude that the clinic was a "principal place of business" for all three of the defendant physicians.

As noted above, the government also contends that in dispensing drugs at the clinic the individual defendant violated the record-keeping requirements of 21 U.S.C. §842(a)(5). That statute provides, "It shall be unlawful for any person — to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this subchapter or subchapter II of this chapter." It is undisputed that the defendants did not make, keep or furnish the required records.

21 U.S.C. §827(c)(1)(B) provides that the record keeping requirements shall not apply:

> (B) to the administering of a controlled substance in schedule II, III, IV, or V unless the practitioner regularly engages in the dispensing or ad-

> ministering of controlled substances and charges his patients, either separately or together with charges for other professional services, for substances so dispensed or administered or unless such substance is administered in the course of maintenance treatment or detoxification treatment of an individual.

Defendant physicians cannot seriously claim that they did not "regularly" dispense or administer controlled substances. Their contention is that at the clinic their patients were not charged, directly or indirectly, for the drugs administered.

The records of the clinic demonstrate that defendants were charging patients for the controlled substances. Each patient who received a controlled substance paid for professional services. Whether the patients were charged separately for the substances or whether they paid a flat fee for professional services, which included the price of the controlled substance administered, is of no moment. Both situations are covered in the statute.

Defendants suggest that when Dr. Wood began practicing at the clinic, the patients ceased to be charged separately for the controlled substances. However, the affidavits show that each patient was charged the same amount whether or not they received controlled substances, and most of the patients did receive controlled substances. The charge for the controlled substance, whether or not it was used, was included together with the charges for the professional services. For the doctors to suggest that the patients were not charged for the controlled substances is absurd. The clinic was certainly not dispensing free medication.

It should be noted that Dr. Varnishung argues that the government is aware of other physicians who register at one or two locations and dispense controlled substances at other locations where they are not registered to do so. Dr. Varnishung claims that the doctors herein are the only physicians (despite the government's knowledge that other physicians operate in the same or similar fashion) against whom the government has sought to enforce the provisions of the Controlled Substances Act.

The decision of the government to file suit against one person instead of another is a proper exercise of executive discretion. *See Wayte v. United States,* 105 S.Ct. 1524 (1985); *United States v. Hoover,* 727 F.2d 387 (5th Cir. 1984).

COUNT 7(f)

In count 7(f), the government alleges that Dr. Wood issued a prescription for thirty-eight dosage units of Diazepam (Valium) to Toni Scott, the Clinic's office manager, not in the usual course of professional treatment and with knowledge that she was not to be the ultimate user of the drug, in violation of 21 U.S.C. §842(a)(1) and 21 U.S.C. §829(b).

21 U.S.C. §842(a)()1) provides, "It shall be unlawful for any person — who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title."

21 U.S.C. §829(b) provides, in pertinent part:

> (b) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or

> IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act.

The regulation promulgated pursuant to §829 provides, in pertinent part:

> (a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

21 C.F.R. §1306.04.

Dr. Wood admitted to Investigator Ira Wald that the Valium was not for Ms. Scott, nor was she under his professional care. Dr. Wood indicated that he obtained the Valium by writing a prescription to Ms. Scott in order to dispense the drug to patients at the clinic. The regulations expressly prohibit such activity. 21 C.F.R. §1306.04(b) pro-

vides, "A prescription may not be issued in order for an individual practitioner to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients."

CONCLUSION

The clinic is liable for civil penalties for each of the incidents alleged in Count 7(a) of the complaint. The clinic is also liable for the thirty-seven instances in which it failed to include the addresses of patients in the drug log, as alleged in Count 7(b). Drs. Wood, Varnishung and Glidden are liable for each of the incidents alleged in Counts 7(c), (d) and (e) of the complaint. Finally, Dr. wood is liable for the prescription written to Ms. Scott. (Count 7(f)).

An order will be entered granting partial summary judgment on the issue of liability in favor of plaintiff and against defendants on each count of the complaint. As a result, trial on March 14, 1990 will be before the court, without a jury, to assess civil penalties. *See Tull v. United States,* 481 U.S. 412, 107 S.Ct. 1831 (1987).

The supplemental memorandum filed on January 19, 1990, on behalf of the clinic and Drs. Glidden and Wood suggests that if the clinic is found liable, the clinic is entitled to summary judgment on its cross-claim against defendant, Kiat Varnishung, M.D. No motion for summary judgment on the cross-claim has been filed. The parties are directed to notify the court within five days whether the cross-claim is to be tried to a jury.

New Orleans, Louisiana, this 15th day of February, 1990.

/s/ Adrian Duplantier

UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	*	CIVIL ACTION
v.	*	NO. 89-3041
CLINICAL LEASING SERVICE, INC., d/b/a Delta Women's Clinic, Inc. d/b/a Delta Women's Clinic, DELTA WOMEN'S CLINIC, INC. KIAT VARNISHUNG, M.D., ROY CLAUDE WOOD, JR., M.D., and RICHARDSON B. GLIDDEN, M.D.	*	SECTION "H"(4)

* * *

JUDGMENT

IT IS ORDERED, ADJUDGED AND DECREED that, pursuant to 21 U.S.C. § 882(a), there be judgment in favor of the plaintiff, United States of America and against the defendants, Clinical Leasing Service, Inc., Delta Women's Clinic, Inc., Kiat Varnishung, M.D., Roy Claude Wood, Jr., M.D., and Richardson B. Glidden, M.D. granting a permanent injunction in the following particulars:

(1) Ordering defendants Clinical Leasing Service, Inc. and/or Delta Women's Clinic, Inc. to maintain on its staff a practitioner registered with the Drug Enforcement Administration at each place of business or professional practice, operated by it, from which controlled substances are administered, dispensed, handled or stored.

(2) Ordering defendants Kiat Varnishung, M.D., Roy Claude Wood, Jr., M.D. and Richardson B. Glidden, M.D. to maintain valid registrations at each location from which defendants dispense controlled substances, as required by Title 21, United States Code, Section 822(a)(1) and (e), Title 21, United States Code, Section 882(a).

(3) Ordering defendants to maintain their records of dispensing controlled substances in compliance with the statutes and regulations promulgated by the Attorney General, as required by Title 21, United States Code, Section 827(b).

(4) Ordering defendant, Roy Claude Wood, Jr. to refrain from issuing prescriptions to any individual other than an ultimate user in the usual course of professional treatment, as required by Title 21, United States Code, Section 829 and Title 21, Code of Federal Regulations, Section 1306.04.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff, United States of America, and against the defendants Clinical Leasing Service, Inc. and Delta Women's Clinic, Inc. jointly, severally and *in solido* in the amount of Three Thousand Dollars ($3,000.00) for each of the one hundred (100) violations charged in Paragraph 7(a) of the Amended Complaint and in the amount of One Thousand Dollars ($1,000.00) for each of the thirty seven (37) violations charged in Court 7(b) of the Amended Complaint, or a total of THREE HUNDRED THIRTY SEVEN THOUSAND DOLLARS ($337,000.00), together with legal interest thereon from the date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff,

United States of America, and against the defendant, Kiat Varnishung, M.D. in the amount of Two Thousand Dollars ($2,000.00) for each of the violations charged in Paragraph 7(b) of the Amended Complaint, or a total of ONE HUNDRED THIRTY-FOUR THOUSAND DOLLARS ($134,000.00), together with legal interest thereon from the date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff, United States of America, and against the defendant, Roy Claude Wood, Jr., M.D., in the amount of Two Thousand Dollars ($2,000.00) for each of the violations charged in paragraph 7(c) of the Amended Complaint and in the amount of Ten Thousand Dollars ($10,000.00) for the violation charged in Paragraph 7(f) of the Amended Complaint, or a total of ONE HUNDRED EIGHTEEN THOUSAND DOLLARS ($118,000.00), together with legal interest thereon from the date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the plaintiff, United States of America, and against the defendant, Richardson B. Glidden, M.D., in the amount of Two Thousand Dollars for each of the violations charged in Paragraph 7(e) of the Amended Complaint, or a total of TWENTY-SIX THOUSAND DOLLARS ($26,000.00), together with legal interest thereon from the date of judicial demand until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants shall bear the costs of this proceeding.

New Orleans, Louisiana, this 15th day of March, 1990.

/s/ Adrian Duplantier
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CIVIL ACTION
VS	NO. 89-3041
DELTA WOMEN'S CLINIC, INC. ETC., ET AL	SECTION "H"

ORDER

The Court has been advised that this action cannot proceed to trial and disposition because of the following reason:

> Counsel for the parties suggest that the remaining claims should not be tried at this time pending appeal in this matter.

Therefore;

IT IS ORDERED that the Clerk of Court mark this action closed for statistical purposes, and

IT IS FURTHER ORDERED that the Court shall retain jurisdiction and that the case shall be restored to the trial docket upon motion of a party if circumstances change, so that it may proceed to final disposition; this order shall not prejudice the rights of the parties to this litigation.

New Orleans, Louisiana, this 19th day of March, 1990.

/s/ Adrian Duplantier
UNITED STATES DISTRICT JUDGE